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89-1878

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK REITER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD E. MISCHEL*
Attorney for Petitioner
225 Broadway
Suite 1804
New York, New York 10007
(212) 406-0181

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether Petitioner's right to due process, as guaranteed by the Fifth Amendment, was violated by the district court's refusal to direct the government to extend use immunity, pursuant to 18 U.S.C. 6001 *et seq.*, to five defense witnesses?

2. Whether the district court's Order excluding the opinion testimony of Petitioner's expert concerning certain intercepted conversations violated his Sixth Amendment right to present a complete defense?

3. Whether the district court's Order denying Petitioner's request that the government provide access to original tapes not disclosed to the defense violated his right to a fair trial?

LIST OF PARTIES

The parties to the proceeding below were Petitioner Mark Reiter, and Defendants-Appellants Raymond Clark, a/k/a "Romar", Leonard Rollack, a/k/a "Petey", a/k/a "Peter Rollack", a/k/a "Peter Ifill", Alfred Dicks and Timothy Smith, and the Respondent, United States of America.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Opinion Below	2
Jurisdiction	2
Constitutional Provisions Involved	3
Statutes Involved	3
Statement of the Case	6
Reasons For Granting the Writ - Conflicts Exist Among the Federal Circuits, and Between the United States Court of Appeals for the Second Circuit and the Court of Appeals of the State of New York, Concerning the Scope of Defense Witness Immunity and the Role, if any, of the Trial Court in Ordering the Prosecution to Confer Immunity or in Conferring Immunity as an Exercise of its Inherent Authority. Moreover, the Issue of Defense Witness Immunity Presents Broad and Important Questions of Federal Law which Have not Been, but Should be, Settled by this Court. Finally, the Petition Presents Substantial Questions Concerning the Fundamental Fairness of Petitioner's Conviction. Accordingly, the Petition for a Writ of Certiorari Should Be Granted	10
Conclusion	19

APPENDIX

Opinion of the United States Court of Appeals For The Second Circuit	A-1
Order of the United States Court of Appeals For the Second Circuit Denying The Government's Petition For Rehearing	A-17

TABLE OF AUTHORITIES

Cases	Page
Andresen v. *Maryland*, 427 U.S. 463 (1976)	11
Baldwin v. *Alabama*, 472 U.S. 372 (1985)	11
Commissioner v. *Bilder*, 369 U.S. 499 (1962)	11
Crane v. *Kentucky*, 476 U.S. 683 (1986)	16
Fuller v. *Oregon*, 417 U.S. 40 (1974)	11
Government of the Virgin Islands v. *Smith*, 615 F.2d 964 (3d Cir. 1980)	11, 12
Layne & Bowler Corp. v. *Western Well Works*, 261 U.S. 387 (1923)	17
People v. *Adams*, 53 N.Y.2d 241, 440 N.Y.S.2d 902, 423 N.E.2d 379 (Ct. Apps. 1981)	14
People v. *Chin*, 67 N.Y.2d 22, 499 N.Y.S.2d 638, 490 N.E.2d 505 (Ct. Apps. 1986)	15
People v. *Owens*, 63 N.Y.2d 824, 482 N.Y.S.2d 250, 472 N.E.2d 26 (Ct. Apps. 1984)	15
People v. *Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (Ct. Apps. 1980)	14
Rice v. *Sioux City Cemetery*, 349 U.S. 70 (1955)	17
United States v. *Burns*, 684 F.2d 1066 (2d Cir. 1982), *cert. denied*, 459 U.S. 745 (1983)	11
United States v. *Capozzi*, 883 F.2d 608 (8th Cir. 1989) *cert. denied*, ___ U.S. ___ (1990)	11, 12

Cases:	Page
United States v. *Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)	11
United States v. *Morrison*, 535 F.2d 223 (3d Cir. 1976), *cert. denied*, 429 U.S. 824 (1976)	11
United States v. *Todaro*, 744 F.2d 5 (2d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985)	13
United States v. *Turkish*, 623 F.2d 769 (2d Cir. 1980) *cert. denied*, 449 U.S. 1077 (1981)	9, 12, 13
UNITED STATES CONSTITUTION	
Fifth Amendment	3
Sixth Amendment	3
STATUTES INVOLVED	
18 U.S.C. 371	2
18 U.S.C. 1961	2
18 U.S.C. 1962	2
18 U.S.C. 6001	3, 7, 8
18 U.S.C. 6002	4, 12
18 U.S.C. 6003	5, 12
21 U.S.C. 812	2
21 U.S.C. 841	2
21 U.S.C. 843	2
26 U.S.C. 7201	2

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Petitioner Mark Reiter respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Second Circuit, entered on or about February 26, 1990, which affirmed as to Petitioner the judgment of the United States District Court, Southern District of New York (Owen, J.), entered on October 24, 1988.

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 897 F.2d 639, and appears as Appendix A1-16 to this Petition. The Court of Appeals, in its February 26th Order, affirmed the judgment of the United States District Court, Southern District of New York, convicting Petitioner of the crimes of Racketeering, 18 U.S.C. 1961 and 1962(c), Conspiracy, 18 U.S.C. 1961 and 1962(d), Engaging in a Continuing Criminal Enterprise, 21 U.S.C. 848, Distribution and Possession With Intent To Distribute Heroin, 21 U.S.C. 812, 841(a)(1) 841(b)(1)(B), Use of a Telephone, 21 U.S.C. 843(b), Distribution and Possession With Intent To Distribute Heroin (prior to amendment), 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(B), and Tax Conspiracy, 18 U.S.C. 371, 26 U.S.C. 7201, and sentencing him, *inter alia*, to concurrent terms of life imprisonment without parole.

The Court of Appeals also affirmed the judgments of conviction and sentences of Defendants-Appellants Raymond Clark, Alfred Dicks, and Timothy Smith; however, Defendant-Appellant Leonard Rollack's conviction was reversed and the matter remanded for a new trial.

The government petitioned for rehearing as to that part of the order reversing Defendant-Appellant Rollack's conviction. On May 4, 1990, the government's application was denied. The Order denying rehearing appears as Appendix A-17 to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254. The Court of Appeals' Order sought to be reviewed was filed on or about February 26, 1990. This Petition for a Writ of Certiorari is filed within ninety (90) days of the judgment of conviction.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment:

> "No person shall *** be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law".

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor".

STATUTES INVOLVED

18 U.S.C. 6001:

"As used in this part

> (1) 'agency of the United States' means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) 'other information' includes any book, paper, document, record, recording, or other material;

(3) 'proceeding before an agency of the United States' means any proceeding before such an agency with respect to which it is authorized to issue subpenas and to take testimony or receive other information from witnesses under oath; and

(4) 'court of the United States' means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, a United States bankruptcy court established under chapter 6, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court, the Tax Court of the United States, the Court of International Trade, and the Court of Military Appeals."

18 U.S.C. 6002:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to -

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witnss may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information

compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

18 U.S.C. 6003:

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment-

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

STATEMENT OF THE CASE

Petitioner Mark Reiter was charged in seven counts of a complex thirteen count superseding indictment*, which identified six defendants and eighteen co-racketeers, with violating and conspiring to violate the racketeering laws by participating in the management of the so-called Jackson (RICO) organization for some seven years, the primary purpose of which was the alleged widespread distribution of heroin in New York and elsewhere. Petitioner was alleged to have participated in the management of the Jackson enterprise through a pattern of racketeering activity which included three conspiracies to murder and murder, federal narcotics violations, conspiracy to distribute and possess with intent to distribute heroin, distribution and possession with intent to distribute heroin on three separate dates, and unlawful use of a communications facility.

Petitioner was also accused in those counts of engaging in a continuing criminal enterprise, and with several of the predicate acts comprising the alleged pattern of racketeering activity, *viz*: federal narcotics violations (two counts) and unlawful use of a telephone, and, finally, of conspiring to impede the Internal Revenue Service in ascertainment and collection of taxes.

Petitioner and four of his named co-defendants pleaded not guilty and jointly proceeded to trial before Honorable Richard Owen, U.S.D.J., and a jury. The trial, which lasted approximately three and one half months, consisted of some sixty government witnesses and three witnesses in rebuttal to Petitioner's case. Petitioner, who did not testify, presented the testimony of sixteen witnesses; co-defendant Rollack presented four witnesses. In addition, numerous exhibits, including tape recorded telephone conversations and videotapes, were admitted into evidence, and many stipulations were read to the jury.

The success of the government's case against Petitioner primarily depended upon the testimony of fourteen persons who

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* Petitioner was named as a defendant in the twelfth superseding indictment, (12S) 87 Cr. 132.

had agreed to testify against Petitioner and/or his co-defendants in return for favorable cooperation agreements. Many of these witnesses were identified in this indictment and/or earlier indictments as co- defendants or co-racketeers.

Both prior to and after the government rested, Petitioner requested the government to grant use immunity, pursuant to 18 U.S.C. 6001 *et. seq.*, to five witnesses who were willing to provide exculpatory testimony but who, after consultation with counsel, decided to invoke their Fifth Amendment privilege. In each instance, the government refused to grant defense witness immunity. Applications were then made to the district court to direct the government to grant immunity to the five proposed witnesses, and each application was denied. Consequently, none of the witnesses testified.

Similar to the governmer.'s cooperating witnesses, three of the proposed defense witnesses were named as defendants or co-racketeers in this and preceding indictments. One of the proposed defense witnesses (Renee Gary) had been given use immunity before the federal grand jury investigating this case. Another witness (Olga Endara) was a target of the same tax investigation as was a witness (Frank DiStefano) who was cooperating with the government against Petitioner. In effect, the government immunized its witness's testimony, but declined to immunize the testimony of an identically situated defense witness.

In addition to denying Petitioner the testimony of five witnesses, the district court ruled inadmissible the proffered testimony of a licensed private investigator, who had considerable experience in electronic surveillance, concerning his interpretation of certain electronically intercepted telephone conversations between Petitioner and other persons named in the indictment as defendants and/or co-racketeers, or persons Petitioner was alleged to have supervised in connection with his continuing criminal enterprise.

The testimony of the defense expert was proferred to rebut the testimony of the government's expert that many of the

electronically intercepted conversations, which were played for the jury, were coded narcotics and narcotics related conversations. The district court ruled the defense witness's testimony inadmissible because Petitioner had not testified, noting that "if Mr. Reiter were to put these statements in while he is on the witness stand, that might be one thing because he is cross-examinable ***. Otherwise, he is not cross-examinable and they are uncross-examinable, arguably in this case, self-serving hearsay statements" (Tr: 7690-91; 7693). In essence, admissiblity hinged on Petitioner's testimony as a witness that "[t]his is what I meant, I said this on other occasions. Then he can be cross-examined" (Tr: 7694).

Finally, the district court denied Petitioner's request that the government be directed to obtain an order unsealing the original tapes of Petitioner's electronically intercepted telephone conversations which the government chose not to use at trial. The basis of the request was that in reviewing the "work copies" of the wiretap, the "duplicate originals", and the wiretap logs, defense counsel had discovered that not only were some of the tapes provided blank, but there were discrepancies among the materials provided leading counsel to conclude that additional, perhaps exculpatory, information might be contained in the balance of the tapes not previously provided to the defense in discovery.

At the Second Circuit, Petitioner, *inter alia*, contended that his right to due process of law was violated by the denial of use immunity to five proposed defense witnesses, pursuant to 18 U.S.C. 6001 *et seq.*, all of whom were willing to provide exculpatory evidence on his behalf in that their testimony was expected to contradict the testimony of several key witnesses who were cooperating with the government. Petitioner pointed out that in each instance, the proposed defense witness was willing to testify but was intimidated by the government. In one instance, one of the three assistant United States attorneys prosecuting this case, responding to defense counsel's arguments concerning the proposed testimony of alleged co-racketeer Ted Key, stated in Mr. Key's presence that "Ted Key has made

contrary statements to the testimony that [defense counsel] anticipates in our office. He can be prosecuted for the false statements to us, if he now contends they were false. *He is in tremendous jeopardy*" (Tr: 7315-16; emphasis added).

The government, relying on the Second Circuit's opinion in *United States v. Turkish*, 623 F.2d 769 [2d Cir. 1980], *cert. denied* 449 U.S. 1077 (1981), responded in essence that four of the proposed defense witnesses were themselves targets in the investigation of this and/or related state cases and that one of the witnesses (Olga Endara) was a target in an unrelated criminal tax investigation. As a consequence, the government's argument continued, conferring use immunity on the proposed witnesses would compromise the government's or the state's ability to prosecute the witnesses for their alleged participation in the crimes under investigation. This is so because, according to the government, it would have the "heavy burden" of establishing that its evidence against each immunized witness had not been obtained as a result of his or her immunized testimony. However, as pointed out by Petitioner, the government's case against these witnesses was established long before this trial by information and testimony provided by the government's fourteen cooperating witnesses.

Petitioner also argued at the Second Circuit that the exclusion of his expert's testimony concerning his interpretation of certain electronically intercepted telephone conversations violated Petitioner's Sixth Amendment right to present witnesses on his behalf. Petitioner argued that the district court's ruling in effect obligated him to waive his Fifth Amendment privilege by himself testifying as a witness in order to avail himself of his expert witness's testimony. This error was compounded, Petitioner argued, by the district court's denial of his request for an order directing the government to provide him with copies of the original tapes which the government decided not to offer into evidence at the trial.

In affirming Petitioner's conviction the Second Circuit tersely stated that "[w]e have carefully reviewed the claims *** and find[ ] all to be without merit" (A16).

REASONS FOR GRANTING THE WRIT

CONFLICTS EXIST AMONG THE FEDERAL CIRCUITS, AND BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE COURT OF APPEALS OF THE STATE OF NEW YORK, CONCERNING THE SCOPE OF DEFENSE WITNESS IMMUNITY AND THE ROLE, IF ANY, OF THE TRIAL COURT IN ORDERING THE PROSECUTION TO CONFER IMMUNITY OR IN CONFERRING IMMUNITY AS AN EXERCISE OF ITS INHERENT AUTHORITY. MOREOVER, THE ISSUE OF DEFENSE WITNESS IMMUNITY PRESENTS BROAD AND IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. FINALLY, THE PETITION PRESENTS SUBSTANTIAL QUESTIONS CONCERNING THE FUNDAMENTAL FAIRNESS OF PETITIONER'S CONVICTION. ACCORDINGLY, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

At the Court of Appeals for the Second Circuit, Petitioner contended, *inter alia*, that his right to due process was violated by the denial of his requests for defense witness immunity for five witnesses. He also argued that his Sixth Amendment right to present witnesses on his behalf was violated by the district court's exclusion of his expert witness's testimony concerning his interpretation of certain electronically intercepted telephone conversations between Petitioner and several other persons allegedly implicated in this case as co-defendants, co-racketeers, or supervisees in a continuing criminal enterprise. This error was compounded by denying Petitioner access to certain original tapes of his telephone conversations which the government decided not to use at the trial.

We submit that, because there is a conflict among the federal circuits, as well as a conflict between the Court of Appeals for the Second Circuit and the court of last resort in the State of

New York - the Court of Appeals, concerning defense witness immunity, and the role to be assumed by the trial court, if any, in determining whether it should be conferred, and further because these issues have not been, but should be, settled by this Court, certioriari to review the Second Circuit's order affirming Petitioner's conviction should be granted (*see Baldwin* v. *Alabama*, 472 U.S. 372, 374 [1985]; *Andresen* v. *Maryland*, 427 U.S. 463, 475 n. 5 [1976]; *Fuller* v. *Oregon*, 417 U.S. 40, 42 [1974]; *Commissioner* v. *Bilder*, 369 U.S. 499, 501 [1962]).

In *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 966 (3d Cir. 1980), the Third Circuit relying on its earlier pronouncements in *United States* v. *Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied* 441 U.S. 913 (1979) (*see also United States* v. *Morrison*, 535 F.2d 223 [3d Cir. 1976], *cert. denied* 429 U.S. 824 [1976]), said that,

> "two possible situations [exist] in which the due process clause might compel granting of immunity to defense witnesses. First *** in cases where government actions denying use immunity to defense witnesses were undertaken with the deliberate intention of distorting the judicial fact finding process,' the court has the remedial power to order acquittal unless on retrial the government grants statutory immunity. *** Secondly *** in certain cases a court may have 'inherent authority to effectuate the defendant's compulsory process right by conferring a *judicially* fashioned immunity upon a witness whose testimony is essential to an effective defense' " (emphasis in original).

Several circuits, including the Second, Sixth, Seventh, Ninth, and District of Columbia, have taken positions similar to that taken by the Third Circuit with regard to the first example as set forth in *Smith, supra*, 615 F.2d at p. 966 (*see United States* v. *Burns*, 684 F.2d 1066, 1077 [2d Cir. 1982], *cert denied* 459 U.S. 745 [1983]; *United States* v. *Capozzi*, 883 F.2d 608, 613 [8th Cir. 1989] [citing cases], *cert. denied*, ____ U.S. ____ [1990]).

As noted in *Capozzi*, "the recommended remedy in such cases *** has not been a grant of judicial immunity to defense witnesses. Rather a court should set aside the conviction and remand the case, in order to afford the government an opportunity to immunize both government and defense witnesses pursuant to 18 U.S.C. 6002 and 6003" (883 F.2d at p. 613).

The second basis suggested by the *Smith* court, *viz*: that a court has inherent power to immunize witnesses whose exculpatory testimony is essential to an effective defense, has been recognized only by the Third Circuit. In *Smith*, *supra*, the court announced a rule which vests the trial court with the power to immunize a potential defense witness when it is determined that the witness can offer testimony which is clearly exculpatory and essential to the defense case, and when the government has no strong interest in withholding statutory immunity (615 F.2d at p. 974). Under *Smith*, the court's power to immunize witnesses is said to exist independently of the prosecutor's authority to grant statutory use immunity.

The Supreme Court has not ruled on whether a court has inherent authority to grant use immunity (*see United States* v. *Capozzi*, *supra*, 883 F.2d at p. 613) and it appears that every circuit that has considered the question, including the Second Circuit in *United States* v. *Turkish*, *supra*, 623 F.2d 769, has rejected the Third Circuit's *Smith* holding as being a violation of the doctrine of separation of powers (883 F.2d at p. 614 [citing cases]). Indeed, the Eighth Circuit in *Capozzi*, *supra*, 883 F.2d at p. 614, reaffirmed "our doubt that such a power lies in the judiciary."

In *United States* v. *Turkish*, *supra*, 623 F.2d 769, the Second Circuit found to be without merit the defendant's contentions that his rights to due process, as guaranteed by the Fifth Amendment, and to compulsory process, as guaranteed by the Sixth Amendment, were violated by the denial of defense witness immunity to several prospective witnesses.

Rejecting the argument that "the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring

his witness to court and have the witness's [privileged] testimony heard" (623 F.2d at pp. 773-74), the court found an "[a]rguably *** more plausible basis for defense witness immunity in the more general and perhaps developing requirement of basic fairness protected by the Fifth Amendment's Due Process Clause" (623 F.2d at p. 774). Constitutionally protected fairness, however, is not violated by the denial of defense witness immunity in cases where, as in *Turkish*, the witnesses' testimony "would either have been cumulative, immaterial, or impeaching only on collateral matters" (623 F.2d at p. 778). Nor does constitutionally protected fairness require that defense witness immunity be ordered "whenever it seems fair to grant it" (623 F.2d at p. 777).

Sensitive to avoiding what the Second Circuit called intrusions into the prosecutor's sphere and to spare district courts the burden of holding needless hearings (*see United States* v. *Todaro*, 744 F.2d 5, 9 [2d Cir. 1984], *cert. denied*, 469 U.S. 1214 [1985]), the *Turkish* court set forth the following guidelines:

> "[t]rial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution. No hearing should be held to establish such status. The prosecutor need only show that the witness has been indicted or present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness' status as an actual or potential target of prosecution to foreclose any inquiry concerning immunity for that witness" (623 F.2d at p. 779).

Though the Second Circuit since *Turkish* has "regularly upheld district court denials of requests for defense witness immunity" (*United States* v. *Todaro*, *supra*, 744 F.2d at p. 8 n. 3) and has questioned whether it is "ever available" (*United States* v. *Todaro*, *supra*, 744 F.2d at p. 6), the court has left unresolved the following question:

> "[i]f a case should arise where the witness is not an indicted defendant and the prosecutor cannot or

> prefers not to present any claim that the witness is a potential defendant, and if the defendant on trial demonstrates that the witness's testimony will clearly be material, exculpatory, and not cumulative, it will be time enough to decide whether in those circumstances a court has any proper role with respect to defense witness immunity" (623 F.2d at pp. 778-79).

By way of contrast, the New York Court of Appeals has taken a more expansive view of defense witness immunity. Beginning with *People* v. *Shapiro*, 50 N.Y.2d 747, 759-60, 431 N.Y.S.2d 422, 429, 409 N.E.2d 897 (Ct. Apps. 1980), the court said,

> "To be sure, ordinarily, exposure, whether to perjury or other criminal charges, is a sufficient basis for a witness' invocation of the privilege against self-incrimination (citations omitted). However, there are times when the exercise of this constitutional right may press on a defendant's due process right to a fair trial and to compulsory process (citations omitted), all the more so when, as in the present cases, the offenses are of such a nature that the only persons capable of furnishing useful testimony will be those implicated in some way in the crime (citation omitted).
>
> Given the power to confer immunity and thereby to compel testimony from a witness who asserts his privilege resides within the discretion of the prosecutor (citation omitted), in an appropriate case it is not to much to expect that the exercise of this prosecutorial discretion be tempered by an obligation to respond to such a problem. On that principle, in cases in which witnesses favorable to the prosecution are accorded immunity while those whose testimony would be exculpatory of the defendant are not, or in ones where the failure to grant immunity deprives the defendant of vital exculpatory testimony, due process may be violated (citing cases)."

One year later, in *People* v. *Adams*, 53 N.Y.2d 241, 247, 440 N.Y.S.2d 902, 904, 423 N.E.2d 379 (Ct. Apps. 1981), then

Associate Judge, now Chief Judge Wachtler, writing for the court, noted that though the prosecutor has discretion to confer full transactional immunity on witnesses for the prosecution or for the defense, that discretion is reviewable for abuse "if, for instance, the prosecutor builds his case with immunized witnesses but denies the defendant a similar opportunity or affirmatively threatens the defendant's witnesses with prosecution for perjury if they give evidence favorable to the defense." (*Acord*: *People* v. *Owens*, 63 N.Y.2d 824, 482 N.Y.S.2d 250, 472 N.E.2d 26 [Ct. Apps. 1984]; *People* v. *Chin*, 67 N.Y.2d 22, 32, 499 N.Y.S.2d 638, 646, 490 N.E.2d 505 [Ct. Apps. 1986]).

In the case at bar, the government entered into cooperation agreements with fourteen individuals, in effect granting them use immunity in return for their cooperation against Petitioner and his co-defendants. Most of the cooperating witnesses had been named in the indictment or preceding indictments as defendants or co-racketeers, and were intimately involved with the Jackson organization. One of the witnesses was a target in a criminal tax investigation.

Petitioner, joined by his co-defendants, sought defense witness immunity for five persons who, similar to the government's witnesses, were criminally implicated in the charges set forth in the indictment. Another witness was also a target of the same criminal tax investigation. A last witness had been granted use immunity for her testimony before the grand jury. Moreover, counsel represented to the district court that each defense witness was expected to contradict certain key cooperating witnesses in their testimony implicating Petitioner in the commission of the crimes charged.

Nevertheless, Petitioner's requests for defense witness immunity were denied. Certiorari should be granted to determine whether Petitioner's due process rights, as guaranteed by the Fifth Amendment, were violated.

Secondly, the district court conditioned the admissibility of expert testimony (concerning his interpretation of Petitioner's electronically intercepted telephone conversations with other

persons connected with this case) on Petitioner's testifying, at which time Petitioner could be cross-examined about what he meant during specific conversations. Petitioner sought the admission of expert testimony to rebut the testimony of the government's expert that, in his opinion, some of those conversations were coded narcotics or narcotics-related conversations. In essence, to vindicate his Sixth Amendment right to present a defense, Petitioner had to surrender his Fifth Amendment privilege not to testify.

Recently, in *Crane* v. *Kentucky*, 476 U.S. 683, 690-91 (1986), this Court said,

> "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers* v. *Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment (citations omitted), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense' ***. We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard."

Mindful that a criminal defendant's rights are subject to certain limitations (*see Crane* v. *Kentucky*, *supra*, 476 U.S. at pp. 689-90), there is no rule, of which we are aware, that, as a precondition to the admission of favorable testimony, the defendant must first subject himself to cross- examination on that same subject, nor is there anything in this Court's cases which suggests that there is such a rule.

Third, the prejudicial effect of the district court's dubious ruling concerning the testimony of Petitioner's expert witness was exacerbated by the district court's ruling which, in effect, denied Petitioner access to the original tapes of conversations which the government chose not to use at trial. Defense counsel had represented to the court that, based on the discrepancies in the materials provided during discovery, and the testimony of two law enforcement officers that the original tapes may have information not contained in the copies provided to counsel (Tr:

5665-66, 5959-61), there may be exculpatory information on the original tapes to which the defense was entitled.

Certiorari should be granted to determine whether Petitioner's Sixth Amendment right to present a defense was violated by the district court's rulings which excluded the expert testimony of Petitioner's witness unless he testified and was subject to cross-examination and, further, denied him access to the original tape-recorded conversations which the government chose not to use at trial.

Finally, the issues raised in this Petition present broad policy questions of significance to the criminal justice system and the federal judiciary in that they implicate the powers of each in the context of a series of interrelated and recurring problems, *viz*: the circumstances, if any, under which the government should grant immunity to defense witnesses, the remedies available to a defendant whose witnesses were denied immunity, and the powers of the court when the government denies immunity to a defense witness. That the issues presented are of significance to the public (*see Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 [1923]; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 79 [1955]), is clear from the interests implicated, i.e., the rights of the accused, the administration of justice, and the role of the federal judiciary. Moreover, the district court's rulings concerning Petitioner's expert witness and access to the original tape recordings of Petitioner's telephone conversations, which the government chose not to use at trial, are so questionable that certiorari should be granted for that reason as well.

To conclude, we respectfully submit that the Petition for Certiorari should be granted to resolve the conflicts among the several circuits, as well as the conflict between the United States Court of Appeals for the Second Circuit and the Court of Appeals, State of New York, on the issue of defense witness immunity. Indeed the subject itself has never been addressed by the Supreme Court. Moreover, defense witness immunity presents broad policy questions of significance to the criminal

justice system and the federal judiciary, implicating not only the rights of all criminal defendants, but also implicating the administration of justice and the role, if any, of the judiciary. Lastly, certiorari should be granted to review the district court's questionable rulings conditioning the admissibility of expert testimony on Petitioner's availability for cross-examination and denying the defense access to original tape recorded conversations which the government chose not to use at trial. Not only were these rulings questionable but they had a direct impact on Petitioner's Sixth Amendment right to present a complete defense.

CONCLUSION

FOR THE REASONS STATED, WE RESPECTFULLY PRAY THAT A WRIT OF CERTIORARI BE GRANTED TO REVIEW THE ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING PETITIONER'S CONVICTION.

Dated: New York, New York
May 25, 1990

Respectfully submitted,

RICHARD E. MISCHEL, P.C.
225 Broadway
New York, New York 10007
(212) 406-0181

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 31, 32, 129, 276, 413—August Term 1989

Argued: September 11, 1989

Decided: February 26, 1990

Docket Nos. 88-1493, 88-1494, 88-1500, 88-1501, 89-1226

UNITED STATES OF AMERICA,

Appellee,

—against—

MARK REITER, RAYMOND CLARK, a/k/a "ROMAR", LEONARD ROLLACK, a/k/a "PETEY", a/k/a "PETER ROLLACK", a/k/a "PETER IFILL", ALFRED DICKS, and TIMOTHY SMITH, a/k/a "HEARTBEAT",

Defendants-Appellants.

Before:

PRATT and MINER,

Circuit Judges.*

* Shortly before the oral argument of this appeal, the third member of the panel found it necessary to disqualify himself. As announced at oral argument, and consistent with § 0.14(b) of the Rules of the Second Circuit, 28 U.S.C. Rules, United States Court of Appeals for the Second Circuit § 0.14(b), the appeal has been decided by the remaining two judges who agree as to the disposition.

Appeals from judgments entered in the United States District Court for the Southern District of New York, Richard Owen, *Judge*, convicting various defendants of offenses, including participation in and conspiracy to participate in a narcotics racketeering enterprise; operation of a continuing criminal enterprise; conspiracy to distribute, and to possess with intent to distribute, heroin; possession with intent to distribute heroin; use of a telephone to facilitate a narcotics felony; and conspiracy to impede the Internal Revenue Service in the ascertainment and collection of taxes.

Affirmed in part, reversed in part, and remanded for new trial with respect to Rollack.

RICHARD E. MISCHEL, New York, NY (Richard E. Mischel, P.C., New York, NY, of Counsel), *for Defendant-Appellant Reiter.*

PAUL J. MCCALLISTER, New York, NY, (Kenny, McAllister & Roland, New York, NY, of Counsel), *for Defendant-Appellant Clark.*

DOUGLAS L. THOMAS, Hempstead, NY, *for Defendant-Appellant Rollack.*

EDWARD M. CHIKOFSKY, New York, NY, *for Defendant-Appellant Dicks.*

JAMES A. COHEN, New York, NY, *for Defendant-Appellant Smith.*

ROBERT HAMMEL, Assistant United States Attorney for the Southern District of New York, New York, NY (Benito Romano, United States Attorney for the Southern District of New York, Maria T. Galeno, Robert W. Ray, Andrew E. Tomback, Kerri Martin Bartlett, Assistant United States Attorneys, New York, NY, of Counsel), *for Appellee*.

PRATT, *Circuit Judge*:

Defendants Mark Reiter, Raymond Clark, Leonard Rollack, Alfred Dicks, and Timothy Smith appeal from judgments of conviction entered against them in the United States District Court for the Southern District of New York, Richard Owen, *Judge*, in connection with their participation in and conspiracy to participate in a racketeering enterprise organized principally to distribute heroin.

Following a four-month trial, the jury found each defendant guilty of every count and every predicate act of racketeering activity submitted to the jury in which that defendant was named. Each defendant now raises numerous issues for review. We affirm in all respects the convictions of Reiter, Clark, Dicks, and Smith. For the reasons set forth below, however, we reverse Rollack's conviction and remand for new trial.

I. BACKGROUND

Defendants were tried on a thirteen-count twelfth superseding indictment, (12S) 87 Cr. 132 (the 12S indictment), that charged seven defendants with, *inter alia*, participation in and conspiracy to participate in a racketeering enterprise. The 12S indictment charged that from approximately January 1, 1980, to October 31, 1987, "the Jackson organization", including the organization's leadership, members, and associates, constituted an enterprise "associated in fact" within the meaning of 18 U.S.C. § 1961(4), which had as its purpose the obtaining of income for the members of the enterprise through a large-scale scheme to distribute heroin in Manhattan, the Bronx, Bridgeport, Connecticut, Washington, D.C., and Boston, Massachusetts. From approximately late 1983 through 1987, the Jackson organization was headed by James Jackson, who eventually became the government's chief witness at trial. The indictment also charged that to protect and preserve the enterprise, its members resorted to fraud and violence, including murder.

Through Jackson's testimony and other evidence, the government presented evidence at trial that the members of the racketeering enterprise distributed millions of dollars worth of heroin over a seven-year period in various locations on the East Coast. Additionally, the government presented evidence that one or more of the defendants charged in the 12S indictment were responsible for at least seven murders and two attempted murders.

The jury convicted all appealing defendants of participation in a racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act

(RICO), 18 U.S.C. § 1962(c), and of conspiracy to violate RICO, 18 U.S.C. § 1962(d). In addition, Reiter was also convicted of operating a continuing criminal enterprise, in violation of 21 U.S.C. § 848(a); two counts of distributing heroin, in violation of 21 U.S.C. § 841; using a telephone to facilitate the commission of a narcotics felony, in violation of 21 U.S.C. § 843(b); and conspiracy to impede the Internal Revenue Service in ascertainment and collection of taxes, in violation of 18 U.S.C. § 371. Rollack, Smith, and Clark were each convicted of conspiracy to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. § 846. Rollack and Smith were also convicted on two counts each of possessing heroin with intent to distribute, in violation of 21 U.S.C. § 841.

Each defendant attacks his convictions on numerous grounds. After careful review, we find most of defendants' arguments to be unworthy of extended treatment, and we limit discussion to (1) Rollack's contention that the district court erred in trying him *in absentia* on the 12S indictment when he had been arraigned only on the fourth superseding indictment (4S indictment); and (2) Smith's claim that the ineffectiveness of his trial counsel mandates reversal of his convictions.

II. DISCUSSION

A. *Trial of Rollack in Absentia*

Rollack claims that his trial *in absentia* on the 12S indictment, on which he was never arraigned, violated his sixth amendment right of confrontation and his right under Fed. R. Crim. P. 43 to be present at the time of arraignment and the taking of the plea. The government

counters that Rollack waived his right to presence when, following arraignment on the 4S indictment and after he had knowledge that he was soon to be arraigned on the tenth superseding indictment (the 10S indictment), Rollack absconded. We hold that the 4S indictment on which Rollack was arraigned was insufficiently similar to the 12S indictment on which he was tried to apprise Rollack of the nature of the proceedings against him. Because Rollack therefore had insufficient knowledge to waive his right to presence, trial in his absence was improper.

A brief review of the charges against Rollack in the 4S, 10S, and 12S indictments is necessary. In the 4S indictment, Rollack was named as a member of the Jackson heroin distribution enterprise, and charged with (1) distribution of heroin in July 1983 in Manhattan, New York; (2) conspiracy to distribute heroin, based on the July 1983 distribution; and (3) separate counts of participation in a racketeering enterprise and conspiracy to violate the racketeering laws. The underlying RICO predicate acts were the July 1983 distribution and the conspiracy charge based on that distribution.

At his arraignment on August 17, 1987, Rollack pled not guilty to the 4S indictment. In September 1987 James Jackson entered into a formal cooperation agreement with the government and supplied information which permitted the government to charge additional crimes against Rollack and his codefendants. Based on the new information, the government, on October 27, 1987, filed the 10S indictment which charged Rollack for the first time, in a predicate racketeering act, with murdering a man named Norman Bannister and with conspiracy to commit that murder. Rollack was also

charged for the first time with two new substantive counts alleging possession of heroin with intent to distribute in two separate locations in the Bronx, New York. These two new charges were added as new predicate acts of the substantive racketeering count and new overt acts for the heroin conspiracy charge. The 10S indictment also realleged the July 1983 heroin distribution and the RICO predicates and overt acts based on that distribution.

By letter dated November 2, 1987, the government distributed to counsel copies of the 10S indictment and scheduled arraignment for November 6, 1987. Rollack's attorney obtained an adjournment of Rollack's arraignment to November 13, 1987, but Rollack absconded before that date and was never arraigned on the 10S indictment.

On February 23, 1988, the government filed the final indictment in the case—the 12S indictment. The charges against Rollack in the 12S indictment were identical to those in the 10S, but the government broadened the scope of the racketeering enterprise in the 12S indictment to include new codefendants who supplied the heroin to Rollack and to the rest of the Jackson distribution organization. One of the new codefendants was also a member of the Gambino organized crime family.

In summary, when compared with the 4S indictment on which Rollack was arraigned, the 12S indictment, on which he was tried *in absentia*, charged him with participation in a substantially broadened racketeering enterprise. It also included two new substantive acts of drug distribution which were added as new predicate acts of racketeering and new overt acts of the drug conspiracy,

and perhaps most importantly, it newly charged Rollack with responsibility for the Bannister murder.

1. *Right to Presence*

A defendant enjoys both a constitutional right and a right under Fed. R. Crim. P. 43 to be present at trial. The constitutional right is premised on an accused's sixth amendment right to confront his accusers, *see Illinois v. Allen*, 397 U.S. 337, 338 (1970), and fifth and fourteenth amendment due process right to be present at certain trial-related proceedings where he is not actually confronting witnesses or evidence against him, *see Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *United States v. Gagnon*, 470 U.S. 522, 526-27 (1985) (per curiam); *United States v. Crutcher*, 405 F.2d 239, 242 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

The right of presence at trial has also been codified in rule 43 which provides:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

Fed. R. Crim. P. 43(a). In framing rule 43, Congress explicitly intended to codify existing law concerning an accused's constitutional and common law rights of presence at trial. *United States v. Fontanez*, 878 F.2d 33, 35 (2d Cir. 1989). Thus rule 43 encompasses the protections afforded by the sixth amendment confrontation clause, the due process clause of the fifth amendment, and the common law right of presence. *Fontanez*, 878 F.2d at 35; *United States v. Gordon*, 829 F.2d 119, 123-24

(D.C. Cir. 1987); *United States v. Alessandrello*, 637 F.2d 131, 138 (3rd Cir. 1980), *cert. denied*, 451 U.S. 949 (1981).

It is well established, however, that despite its constitutional and statutory underpinnings, the right of presence may be waived as long as the waiver is both knowing and voluntary. *See, e.g., Taylor v. United States*, 414 U.S. 17, 18-20 (1973) (per curiam); *Diaz v. United States*, 223 U.S. 442, 455-58 (1912); *Fontanez*, 878 F.2d at 35; *United States v. Hernandez*, 873 F.2d 516, 518 (2d Cir. 1989); *United States v. Tortora*, 464 F.2d 1202, 1208 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972). Indeed, rule 43(b)(1) itself provides that "[t]he further progress of the trial * * * shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present, * * * is voluntarily absent after the trial has commenced * * * ."

In *Tortora*, 464 F.2d at 1209, we stated that trial may proceed in a defendant's absence if "[i]t * * * clearly appear[s] in the record * * * that the defendant was advised when proceedings were to commence and that he voluntarily, knowingly, and without justification failed to be present at the designated time and place * * * ." This is so because a defendant may not unilaterally set the time or circumstances of his trial. *United States v. Sanchez*, 790 F.2d 245, 249 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986); *Tortora*, 464 F.2d at 1208; *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963). Instead, the defendant bears the burden of justifying his absence from a known proceeding against him. *Sanchez*, 790 F.2d at 249; *Tortora*, 464 F.2d at 1209.

Rollack's primary contention is that, absent arraignment, he had insufficient knowledge of the proceeding against him to "knowingly" waive his right to presence. He argues that rule 43 and our language in *Tortora* preclude trial in a defendant's absence unless he has been arraigned on the particular indictment that is the subject of the trial. In *Tortora*, we undertook our most extensive discussion of the knowledge a defendant must have before he may waive presence and be tried *in absentia*:

> Before a trial may proceed in the defendant's absence, the judge must find that the defendant has had adequate notice of the charges and proceedings against him. Notice is initially given to a defendant by the issuance of an indictment. But not until the defendant answers the indictment by pleading in open court to the charges therein can a court know with certainty that the defendant has been apprised of the proceedings begun against him. Thus no defendant can be tried until after he personally has entered a plea to the charge.

464 F.2d at 1209.

Rollack asserts that this language erects an absolute barrier to trial *in absentia* on any indictment until a defendant has been arraigned, because only arraignment and plea in open court assure that the defendant had notice of the charges against him. The government, on the other hand, contends that *Tortora* means only that a defendant must have "been apprised of the proceedings begun against him". According to the government, once a defendant has been arraigned on an indictment, and is therefore aware that criminal proceedings have begun against him, he may be tried *in absentia* on any superseding indictment if the district court finds, based on the

circumstances of the case, that the defendant must have had notice of the charges against him. We disagree with both contentions.

First, we stress that *Tortora* did not deal with a superseding indictment, but with the government's issuance of a first indictment. *Tortora*, then, holds only that when the government initiates new criminal proceedings against a defendant, the defendant must be arraigned and must plead in open court in accord with rule 43(a) to ensure that the defendant knows the proceedings have begun against him and also knows the nature of those proceedings. *Accord United States v. Christopher*, 700 F.2d 1253, 1261-62 (9th Cir.), *cert. denied*, 461 U.S. 960 (1983); *United States v. Diacolios*, No. 84 Cr. 436-CSH (S.D.N.Y. Sept. 9, 1986) (Available on LEXIS, Genfed Library, Dist File) (Available on WESTLAW, Federal Database); *see also* 8B J. Moore, Moore's Federal Practice ¶ 43.02[2], at 43-13 (2d ed. 1989) ("In felony cases, the defendant's presence at arraignment [and] at the time of plea * * * is mandatory."). A defendant's knowledge that particular proceedings have begun is so critical that we will not permit trial *in absentia* based on fine calculations of what the defendant knew, what he might have known, or what he should have known. Instead, we insist, as in *Tortora*, on a *per se* rule that requires an arraignment.

This *per se* rule of arraignment also applies in the superseding indictment context, at least where it serves the same function we held critical in *Tortora*: notifying a defendant that particular proceedings have been initiated against him. Thus, when a superseding indictment is sufficiently different from a prior indictment on which the defendant has been arraigned that it is tanta-

mount to the initiation of "new" criminal proceedings against the defendant, and the prior arraignment cannot reasonably be said to have apprised the defendant of the current proceedings, the government may not proceed *in absentia* on the superseding indictment unless the defendant has been arraigned on the superseder. *Cf. United States v. Londono*, 659 F. Supp. 984, 987 (E.D.N.Y. 1987) (arraignment not prerequisite to trial *in absentia* on superseding indictment where defendant had been arraigned on prior indictment because, though superseding indictment added new charges, it constricted scope of conspiracy). In such a situation, only arraignment ensures the defendant has been apprised of the current criminal proceeding against him.

In this case, Rollack was arraigned on the 4S indictment as a one-time heroin distributor, a narcotics conspirator, and a narcotics racketeer, based on a single distribution of heroin in July 1983 in Manhattan. The 12S indictment, by contrast, based in large part on the vastly expanded evidence the government gained after enterprise-chief Jackson began cooperating, broadened the conspiracy in which Rollack was charged to include not only those conspirators involved in distribution of heroin, but also those responsible for supplying the heroin. It also named Rollack for the first time in a predicate act alleging murder and conspiracy to commit the Bannister murder.

The addition of the murder predicate linking Rollack for the first time with participation in the murder and with the violence used to protect the racketeering enterprise, combined with the substantially broadened scope of the enterprise, rendered the 12S indictment sufficiently different from the 4S that arraignment on the

12S indictment was required before Rollack could be tried *in absentia*. In this context, only arraignment could ensure that Rollack had notice of the proceedings and that any waiver was "knowing".

Finally, the error was not harmless. In determining whether error is harmless, we may uphold a conviction only if the government can establish beyond a reasonable doubt that the defendant's absence did not create "any reasonable possibility of prejudice." *Fontanez*, 878 F.2d at 37 (quoting *United States v. Toliver*, 541 F.2d 958, 965 (2d Cir. 1976)); *Walker v. United States*, 322 F.2d 434, 436 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 976 (1964). *See also Chapman v. California*, 386 U.S. 18, 24 (1967). Where, as here, the defendant was absent from an arraignment necessary to ensure that he had notice of the nature of the proceedings against him as well as all subsequent phases of the trial, the government cannot meet its heavy burden of showing that Rollack's absence did not create "any reasonable possibility of prejudice." *Christopher*, 700 F.2d at 1262. We therefore reverse and remand Rollack's case for new trial.

B. *Ineffective Assistance of Smith's Counsel*

Defendant Smith contends that his convictions must be reversed on grounds of ineffective assistance of counsel. We disagree.

Immediately following his convictions, Smith obtained new counsel and moved for a new trial. He argued that his trial attorney, Wilmer Grier, had provided ineffective assistance because, *inter alia*, (1) she failed to move to suppress bullets and cash found in Smith's pockets while he was in a hospital receiving medical attention for a bullet wound; (2) she failed to develop through

cross-examination and to communicate to the jury Smith's theory of defense that chief prosecution witness, James Jackson, would lie about Smith's involvement in the drug organization because Jackson felt sexually inferior to Smith; and (3) she had pled guilty to a misdemeanor forgery charge shortly before trial commenced. He also asserted that Grier's latenesses and absences during the four-month trial, which led to various reprimands from the trial judge, to two findings of contempt against Grier, and ultimately to the court's ordering Grier's incarceration at the Metropolitan Correctional Center for a short period in order to ensure her appearance at trial, constituted ineffective assistance.

The trial court examined all of Smith's claims under the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that to establish ineffective assistance of counsel, a defendant must demonstrate both that his attorney's conduct fell below an objective standard of reasonableness, *id.* at 688, and that but for his attorney's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. The court held that Grier's failure to move to suppress evidence in combination with her frequent latenesses and absences and her entire cross-examination of Jackson, fell below professionally reasonable standards, but that the claim of ineffective assistance nevertheless failed because, given the overwhelming evidence of Smith's guilt, he was not prejudiced by Grier's performance.

In this appeal, Smith advances additional claims of Grier's ineffectiveness and now argues that the mistakes were so pervasive that he, in effect, had no counsel at all. He therefore urges that prejudice be presumed. *See, e.g., United States v. Cronic*, 466 U.S. 648, 658-59

(1984). After careful scrutiny of the record, we hold that Grier's performance, though at times below an objective standard of reasonableness, did not fall to the level of constructive absence. In analyzing the claims premised on Grier's deficient performance at trial, therefore, the trial judge correctly applied the two-part *Strickland* standard that required Smith to prove prejudice, and he correctly concluded that in the face of the overwhelming evidence against him, Smith had not met that burden.

Nor could Smith succeed even on his present contention that the burden should be on the government to prove beyond a reasonable doubt that Grier's absences did not contribute to the verdicts. *See Satterwhite v. Texas*, 486 U.S. 249, 256-58 (1988); *Penson v. Ohio*, 109 S. Ct. 346, 353-54 (1988); *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658-60; *Sanders v. Lane*, 861 F.2d 1033, 1040 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1323 (1989); *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1017-19 (7th Cir. 1988); *Siverson v. O'Leary*, 764 F.2d 1208, 1217-21 (7th Cir. 1985).

Judge Owen did not rest his conclusion on the differing burdens of proof that apply under *Strickland* and *Satterwhite*. He went further and made express factual findings that Grier's collective errors, including her absences from trial, did not have any impact on the outcome of the trial. In denying Smith's motion for a new trial, Judge Owen also expressly found that "in view of the 'overwhelming record support' against Smith neither Grier's failure to suppress nor other instances of concededly questionable and unprofessional conduct warrant a new trial, since the outcome in my view *would have been the same* even absent these incidents." *United States v. Smith*, No. 87 Cr. 132 (S.D.N.Y. April 10,

1989) (emphasis added). Moreover, Judge Owen found that "the evidence was *so overwhelming* and left *no doubt* of guilt of murders and narcotics trafficking, testified to over nearly four months, [that] * * * [no] view of the desirable pristine image of law requires a second and extended trial [for] Smith where the *outcome would unquestionably be the same*". *Id.* at n.8 (emphasis added). These findings are are fully supported by the record.

C. *Other Claims*

We have carefully reviewed the claims of the other appealing defendants and, finding all to be without merit, we affirm the convictions of each.

III. CONCLUSION

The convictions of Mark Reiter, Raymond Clark, Alfred Dicks, and Timothy Smith are affirmed in all respects. The conviction of Leonard Rollack is reversed and remanded for a new trial because his trial *in absentia* absent arraignment on the 12S indictment was improper.

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of May one thousand nine hundred and ninety

Present:
Hon. GEORGE C. PRATT,
Hon. ROGER J. MINER,

Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

v.

MARK REITER, RAYMOND CLARK, a/k/a "ROMAR" ' LEONARD ROLLACK, a/k/a "PETEY" ' a/k/a "PETER IFILL", ALFERD DICKS, and TIMOTHY SMITH, a/k/a "HEARTBEAT",

Defendants-Appellants

Docket No.
#88-1493(L),
88-1494
#88-1500,
88-1501,
89-1226

A petition for a rehearing having been filed herein by Appellee UNITED STATES OF AMERICA.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1878

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARK REITER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner's due process rights were violated because five defense witnesses were not granted use immunity.

2. Whether the district court erred in excluding opinion testimony interpreting intercepted conversations that had not been introduced into evidence.

3. Whether the district court properly denied petitioner's request for additional copies of certain tape-recorded conversations.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Autry v. *Estelle*, 706 F.2d 1394 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984)	6
Daley, In re, 549 F.2d 469 (7th Cir.), cert. denied, 434 U.S. 829 (1977)	7
Government of the Virgin Islands v. *Smith*, 615 F.2d 964 (3d Cir. 1980)	5, 6
Mattheson v. *King*, 751 F.2d 1432 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986)	6
People v. *Adams*, 53 N.Y.2d 241, 440 N.Y.2d 902, 423 N.E.2d 379 (1981)	8
People v. *Chin*, 67 N.Y.2d 22, 499 N.Y.S.2d 638, 490 N.E.2d 505 (1986)	8
People v. *Owens*, 63 N.Y.2d 824, 482 N.Y.S.2d 250, 472 N.E.2d 26 (1984)	8
Pillsbury Co. v. *Conboy*, 459 U.S. 248 (1983)	6
United States v. *Alessio*, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976)	7
United States v. *Angiulo*, 897 F.2d 1169 (1st Cir. 1990), petition for cert. pending, No. 90-10	8
United States v. *Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976)	7
United States v. *Capozzi*, 883 F.2d 608 (8th Cir. 1989), cert. denied, 110 S. Ct. 1947 (1990)	7, 8
United States v. *D'Apice*, 664 F.2d 75 (5th Cir. 1981)	7
United States v. *Eagle Hawk*, 815 F.2d 1213 (8th Cir. 1987), cert. denied, 484 U.S. 1012 (1988)	7
United States v. *Graham*, 548 F.2d 1302 (8th Cir. 1977)	7

Cases—Continued: Page

United States v. *Hardrich*, 707 F.2d 992 (8th Cir.), cert. denied, 464 U.S. 991 (1983) 7
United States v. *Heffington*, 682 F.2d 1075 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983) 6
United States v. *Hooks*, 848 F.2d 785 (7th Cir. 1988) 6-7, 8
United States v. *Karas*, 624 F.2d 500 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) 7
United States v. *Lenz*, 616 F.2d 960 (6th Cir.), cert. denied, 447 U.S. 929 (1980) 7
United States v. *Pennell*, 737 F.2d 521 (6th Cir. 1964), cert. denied, 469 U.S. 1158 (1985) 6
United States v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982) 7
United States v. *Turkish*, 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981) 7, 8

Statutes and rule:

Immunity of Witnesses Act, 18 U.S.C. 6001 *et seq.*... 5, 6
18 U.S.C. 371 2
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
21 U.S.C. 841 2
21 U.S.C. 843(b) 2
21 U.S.C. 848(a) 2
Sup. Ct. R. 13.4 1

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1878

MARK REITER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 897 F.2d 639.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1990. A petition for rehearing filed by the United States was denied on May 4, 1990.[1]

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[1] The government filed a rehearing petition seeking reconsideration of the reversal of the conviction of petitioner's co-defendant, Leonard Rollack. Neither petitioner nor the government sought further review of the judgment against petitioner in the court of appeals. Pursuant to Rule 13.4 of the Rules of this Court, however, a rehearing petition filed by "any party" tolls the time in which to file a petition for a writ of certiorari for all parties.

Pet. App. A17. The petition for a writ of certiorari was filed on May 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity (RICO) (Count 1), in violation of 18 U.S.C. 1962(c); RICO conspiracy (Count 2), in violation of 18 U.S.C. 1962(d); operating a continuing criminal narcotics enterprise (CCE) (Count 3), in violation of 21 U.S.C. 848(a); distributing heroin (Counts 5 and 6), in violation of 21 U.S.C. 841; using a telephone to facilitate the commission of a narcotics felony (Count 7), in violation of 21 U.S.C. 843(b); and conspiring to impede and obstruct the Internal Revenue Service in the collection of taxes (Count 13), in violation of 18 U.S.C. 371. The district court sentenced petitioner to life imprisonment without parole on Counts 3 and 5. On the remaining counts, the court imposed consecutive terms totalling 60 years' imprisonment, to be followed by a lifetime term of special parole. Petitioner was also fined a total of $4 million.

1. Briefly summarized, the evidence at the four-month trial showed that petitioner was a major supplier of heroin. He employed several men who stored, cut, and packaged heroin and distributed it to petitioner's clients. Gov't C.A. Br. 30-38. Among those clients was a racketeering enterprise operated by Eugene Romero and James Jackson. Between 1980 and 1987, petitioner distributed approximately 45 kilograms of pure heroin worth more than $10 million to Romero and Jackson. *Id.* at 6-20.

Petitioner's initial contact person in the Romero-Jackson organization was Steven Ash. After Ash fell behind in his payments to petitioner by approximately $100,000, petitioner met with Romero and Jackson and asked to have Ash replaced as his contact; thereafter, petitioner worked directly with Romero. Petitioner subsequently learned that the boyfriend of Ash's sister was cooperating with the government. Petitioner told Jackson and Romero that he feared that Ash and his sister would also cooperate, and he instructed Jackson and Romero "to get rid of them." Gov't C.A. Br. 17. Petitioner's instructions were carried out; both Ash and his sister were shot and killed. *Id.* at 18-20.

Although petitioner sold his heroin for as much as $240,000 per kilogram, he reported little or no income to the IRS between 1980 and 1987. He lived lavishly, however. Petitioner rented a Manhattan apartment, owned a house in Merrick, New York, and owned or leased a number of luxury cars and expensive boats. Gov't C.A. Br. 40-43.

2. a. Petitioner called 23 witnesses in his own behalf. Gov't C.A. Br. 23. He also asked the district court to direct the government to grant use immunity to five of his criminal accomplices, including Romero. The district court refused to do so on the ground that each was an actual or potential target of prosecution. *Id.* at 140-145.

b. During its investigation, the government conducted court-authorized electronic surveillance of two telephone lines in petitioner's Manhattan apartment. Each conversation was simultaneously recorded in triplicate. One set of tapes was sealed and preserved for possible use at trial. The other two sets were used to make copies for the parties. Prior to trial, the government gave petitioner a copy of the wire-

tap log sheets that were made contemporaneously during the surveillance. For each call, the log sheets gave the time, the date, the identification of the parties, and a brief description of the conversation. Petitioner also received a copy of all the intercepted conversations, which had been made from the unsealed tapes. During the trial, petitioner contended that one of the tapes he had received was blank, and that the log for that tape indicated that it should have contained conversations. The government made a new copy of that tape for petitioner. However, the government refused petitioner's request to unseal all of the tapes that had been sealed and provide a new copy of all the intercepted conversations from those tapes. The government resisted that request on the ground that it was unnecessary and burdensome. The district court upheld the government's refusal to make a whole new copy of all the intercepted conversations from the sealed tapes. Gov't C.A. Br. 101-114.

c. At trial, Edward Seidlick, a private investigator, testified for petitioner as an expert in electronic surveillance. After Seidlick gave his opinion as to the meaning of conversations recorded on the tapes that the government had introduced into evidence, petitioner sought to question Seidlick about other tapes that had not been introduced. The district court ruled that petitioner had failed to proffer a theory under which either the additional tapes or Seidlick's testimony concerning those tapes could be admitted. Gov't C.A. Br. 108-110.

3. The court of appeals found petitioner's claims that he had been unfairly restricted in presenting his defense to be "without merit," and affirmed his convictions. Pet. App. A16.

ARGUMENT

1. Petitioner first contends (Pet. 10-15) that the failure of the district court to order the government to grant use immunity, pursuant to 18 U.S.C. 6001 *et seq.*, to five prospective defense witnesses violated his right to due process. The government declined to grant use immunity to the five witnesses because each was an actual or potential target of prosecution. Gov't C.A. Br. 140-145.

In *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 966 (1980), the Third Circuit stated that a due process violation would be found "where government actions denying use immunity to defense witnesses were undertaken with the 'deliberate intention of distorting the judicial fact finding process.'" Although petitioner relies heavily on the *Smith* case, that case is readily distinguishable from this one. The district court correctly concluded in this case that the government was not attempting to distort the fact finding process, but was legitimately unwilling to grant immunity to petitioner's witnesses because each was an actual or potential target of a criminal prosecution.[2] As the Third Circuit recog-

[2] Petitioner suggests (Pet. 14) that the facts showed that the government was attempting to distort the fact finding process because it granted immunity to 14 prosecution witnesses, but was unwilling to grant immunity to the five defense witnesses. The two groups, however, are not comparable. All but three of the 14 witnesses to whom petitioner refers had entered into plea agreements and were no longer potential targets of prosecution. Of the three remaining witnesses, two were low-level employees who cut and packaged heroin for petitioner, and the third had failed to file a currency transaction report with respect to the sale of a boat to petitioner. Those witnesses were clearly distinguishable from the witnesses petitioner sought to immunize. For example, Romero was a drug kingpin.

nized in *Smith*, a defendant "should not be empowered to give his confederates an immunity bath." 615 F.2d at 973.[3]

Petitioner notes (Pet. 11) that the Third Circuit held in *Smith* that a court has inherent authority to immunize witnesses. 615 F.2d at 969. We disagree with that conclusion. The federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to grant immunity in the Executive Branch, not the Judiciary. This Court accordingly has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). The corollary of that principle is that "[n]o court has authority to immunize a witness." *Ibid.* Not surprisingly, the great majority of the courts of appeals have held that judges may not immunize defense witnesses without a request from the prosecution.[4]

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[3] Moreover, in *Smith*, unlike in this case, the prosecutor never explained why she was unwilling to grant immunity. 615 F.2d at 967. That failure was compounded by the fact that the witness at issue was a minor subject to the exclusive jurisdiction of the juvenile authorities, and the juvenile authorities had made clear that they did not object to granting use immunity to the witness. *Ibid.* And in sharp contrast to this case, the testimony that the witness would have given in *Smith* was "highly relevant, and possibly exculpatory." *Id.* at 969.

[4] See, *e.g.*, *United States* v. *Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Matteson* v. *King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States* v. *Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Autry* v. *Estelle*, 706 F.2d 1394, 1401-1402 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir.

In light of *Pillsbury Co.* v. *Conboy*, we doubt that the Third Circuit would now conclude that courts have inherent authority to immunize witnesses. But no grant of immunity would be warranted in this case in any event. The Third Circuit made clear in *Smith* that immunity would not be granted where "the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative, or if it is found to relate only to the credibility of the government's witnesses." 615 F.2d at 972. That is essentially the same test that was applied in this case in deciding that the government's refusal to immunize the five defense witnesses did not deny petitioner a fair trial. The due process test used by the Second Circuit in cases in which the prosecutor has refused to immunize a defense witness is whether the refusal is not justified by legitimate prosecutorial interests and whether "the witness's testimony will clearly be material, ex-

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1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *D'Apice*, 664 F.2d 75, 77 (5th Cir. 1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980); cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1080-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); see also *United States* v. *Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989), cert. denied, 110 S. Ct. 1947 (1990); *United States* v. *Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir. 1987), cert. denied, 484 U.S. 1012 (1988); *United States* v. *Hardrich*, 707 F.2d 992, 993-994 (8th Cir.), cert. denied, 464 U.S. 991 (1983).

culpatory, and not cumulative." *United States* v. *Turkish*, 623 F.2d 769, 778 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). Petitioner has failed to show that the witnesses he seeks to immunize would exculpate him. Instead, he has merely made conclusory statements such as that "each defense witness was expected to contradict certain key cooperating witnesses." Pet. 15. Moreover, the witnesses were all targets of active criminal investigations. There was therefore a strong and legitimate prosecutorial interest in not immunizing the witnesses and making their ultimate prosecution more difficult.

A number of courts, including the Second Circuit, have suggested that in extreme instances the government's refusal to immunize a defense witness might give rise to a due process violation. See, *e.g.*, *United States* v. *Angiulo*, 897 F.2d 1169, 1190-1192 (1st Cir. 1990), petition for cert. pending, No. 90-46; *United States* v. *Capozzi*, 883 F.2d 608, 613-614 (8th Cir.), cert. denied, 110 S. Ct. 1947 (1990); *United States* v. *Turkish*, 623 F.2d at 771-779; *People* v. *Adams*, 53 N.Y.2d 241, 247, 440 N.Y.S.2d 902, 904, 423 N.E.2d 379, 381 (1981); *People* v. *Owens*, 63 N.Y.2d 824, 482 N.Y.S.2d 250, 472 N.E.2d 26 (1984); *People* v. *Chin*, 67 N.Y.2d 22, 32, 499 N.Y.S.2d 638, 646, 490 N.E.2d 505, 515 (1986). See also *United States* v. *Hooks*, 848 F.2d 785, 801-803 (7th Cir. 1988). No court, however, has ever reversed a conviction on that basis. Moreover, the courts that have discussed the due process issue have made clear that reversal on that ground would be appropriate only in cases where the balance of interests was far more compelling in the defendant's favor than in this case. Thus, the decision in this case does not conflict with the decision of any other court of appeals or any state court.

2. Contrary to petitioner's contention (Pet. 15-16), the district court properly refused to permit petitioner's expert witness, private investigator Edward Seidlick, to interpret words and phrases used in tape-recorded conversations that had not been introduced into evidence. First, petitioner has not shown how the conversations are relevant. Second, Seidlick was not competent to introduce the tapes. He was not a party to the conversations; nor could he verify their accuracy and authenticity. Moreover, to the extent that the conversations did not involve discussions of petitioner's narcotics business but were introduced to prove the truth of the matters asserted, they were hearsay. Because the government could not cross-examine petitioner about the statements, they were properly excluded. Petitioner has not proffered a theory under which those recordings should have been admitted. Accordingly, he has not shown that the district court abused its discretion in excluding them.

3. Finally, petitioner argues (Pet. 16-17) that the district court should have ordered the government to unseal the sealed tapes during trial and make new copies from them. That argument is wholly without merit. The government provided a copy of all the intercepted conversations to petitioner two months before trial. Subsequently, the government provided a corrected copy of the one faulty tape that had been supplied to petitioner, and it offered to correct any other problem petitioner identified from a comparison of the tapes with the log. But petitioner identified no additional problems. The district court acted well within its discretion in denying petitioner's motion that the government comply with his burdensome request where petitioner could do no more than offer

the groundless speculation that "there may be exculpatory information on the original tapes." Pet. 17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

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